BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

NGOC HUYNH	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,000,614
NATIONAL BEEF PACKING COMPANY	)	
Respondent	)	
AND	)	
	)	
COMMERCIAL UNION INSURANCE	)	
Insurance Carrier	)	

ORDER

Claimant appealed the May 7, 2004 Award entered by Administrative Law Judge Pamela J. Fuller. The Board heard oral argument on September 21, 2004.

APPEARANCES

Stanley R. Ausemus of Emporia, Kansas, appeared for claimant. Kendall R. Cunningham of Wichita, Kansas, appeared for respondent and its insurance carrier (respondent).

RECORD AND STIPULATIONS

The record considered by the Board and the parties' stipulations are listed in the Award. The parties also stipulated to a pre-injury average weekly wage of $543.54, which includes additional compensation items, and that the record also includes the deposition of Dr. Philip R. Mills, which was taken on April 26, 2004.

ISSUES

Claimant alleges she injured her right hip, both legs and back in a series of mini-traumas working for respondent in its packing plant. In the May 7, 2004 Award, Judge Fuller awarded claimant permanent partial general disability benefits based upon claimant's stipulated 10 percent whole body functional impairment rating. The Judge used June 15, 2001, as the accident date for the alleged period of accident.

Claimant contends Judge Fuller erred. Claimant argues she was unable to perform the job of bagging finger meat that she was performing in November 2002, when she last worked for respondent. Accordingly, claimant argues she is entitled to receive a work disability (a permanent partial general disability greater than the functional impairment rating) of not less than 45.75 percent.

Conversely, respondent contends the Award should be affirmed. Respondent argues claimant's permanent partial general disability should be limited to the 10 percent stipulated whole body functional impairment rating as respondent accommodated claimant's work restrictions by providing her with the bagging finger meat job, which claimant abandoned.

The only issue before the Board on this appeal is the extent of claimant's permanent partial general disability.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record and considering the parties' arguments, the Board finds and concludes:

Claimant worked for respondent for more than eight years. Claimant filed this claim alleging she sustained a series of micro-traumas at respondent's packing plant injuring her right hip, legs and back. The parties stipulated claimant sustained a 10 percent whole body functional impairment due to her work-related injuries.

According to respondent's records, claimant sustained her work-related injuries while performing the job of lean upgrade. Respondent provided claimant with medical treatment, which included the services of a Wichita neurosurgeon. Because of medical restrictions given claimant, respondent moved claimant to the job of bagging finger meat trim. Claimant performed that job until early November 2002, when she left the plant after allegedly complaining to her supervisor that she could not continue doing the job as it was increasing the symptoms from her injuries. The record is not entirely clear, but it appears claimant was transferred to the bagging job sometime in either December 2001 or January 2002.

Respondent's records indicate claimant last worked at the packing plant on November 7, 2002. Claimant contends she believed she had been fired as her supervisor allegedly told her to go home when she complained about her symptoms and needing help bagging meat after her supervisor allegedly removed two coworkers who were helping claimant bag meat.

On the other hand, claimant's supervisor, Juan Don Juan, testified that he could not recall claimant's last day at work. But Mr. Juan also indicated that claimant's version of the events was not credible as he would not have taken away two workers from claimant's bagging table for more than 15 to 30 minutes because that would have adversely affected production. Mr. Juan also testified that he would have directed claimant to the nursing department had she complained to him of experiencing symptoms from her work.

Claimant left the plant without clocking out and without reporting her problems or symptoms to respondent's nursing department, the workers compensation coordinator, or the personnel department. Claimant was officially terminated on November 9, 2002, and classified as a voluntary quit.

After leaving the packing plant, claimant had no further contact with respondent. At the February 2004 regular hearing, claimant testified she was not working and had not looked for work since leaving respondent's employ. Claimant testified, in part:

> Q. (Mr. Ausemus) Have you been looking for work?
>
> A. (Claimant) No.
>
> Q. Since your termination you haven't been looking for work?
>
> A. No.
>
> Q. And so the judge understands, why haven't you been looking for work?
>
> A. I hurt my back. Don't think I can work.
>
> Q. You don't feel you can work; is that right?
>
> A. No, I not working. I'm not looking for work because I hurt my back. I can't work. I working but sometime I stop, you know, I mean --[1]

Contrary to claimant's belief that she is unable to work, the medical evidence establishes that claimant is capable of working. In early August 2002, claimant, at her attorney's request, saw board-certified orthopedic surgeon C. Reiff Brown, M.D. Dr. Brown diagnosed degenerative disc disease in the lumbosacral spine that was rendered symptomatic by her work for respondent. The doctor also concluded claimant had a herniated disc at the L5-S1 intervertebral level for which she should consider surgery. Finally, the doctor recommended that claimant observe the following permanent work restrictions:

[1] R.H. Trans. at 30.

> I felt that she should permanently avoid lifting above 30 pounds occasionally and 20 pounds frequently. And would advise that she do all lifting utilizing proper body mechanics. She should not do work that involved frequent bending or rotation of the spine more than 30 degrees.[2]

When Dr. Brown evaluated claimant, the doctor took a history that claimant was then performing light duty work, which did not violate his recommended restrictions. The record would indicate the light duty work that claimant was performing in August 2002 was bagging finger meat.

Dr. Philip R. Mills also testified in this claim. Dr. Mills, who is board-certified in physical medicine and rehabilitation, examined claimant in May 2002 at respondent's request. The doctor also diagnosed degenerative disc disease with a herniated disc at L5-S1 and bulging at the L4-5 intervertebral space. During the examination, claimant advised Dr. Mills that she was able to perform her light duty job of packaging meat. The doctor recommended a regular exercise program for claimant's back and permanent work restrictions. Dr. Mills noted, in part:

> The following work restrictions are suggested: She should lift only with good body mechanics and particularly avoid a twist/bend. She should be able to change positions on a prn basis. She is able to tolerate her present job. She would be considered at substantial risk for further back problems in the future.[3]

Dr. Mills also testified that back surgery was appropriate treatment should claimant so desire.

The Board finds and concludes that the Award should be affirmed. The evidence establishes that respondent provided claimant with an accommodated job that did not violate her work restrictions. Both doctors, Dr. Brown and Dr. Mills, testified that the light duty bagging job was appropriate for claimant considering her back injury and work limitations. Claimant abandoned her job without contacting respondent's nursing department, the workers compensation coordinator, or the personnel department. And since leaving respondent's employ, claimant has not looked for work.

Permanent partial general disability is defined by K.S.A. 44-510e, which provides, in part:

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[2] Brown Depo. at 9.

[3] Mills Depo., Ex. 2 at 5.

> Permanent partial general disability exists when the employee is disabled in a manner which is partial in character and permanent in quality and which is not covered by the schedule in K.S.A. 44-510d and amendments thereto. **The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury.** In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein. **An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.** (Emphasis added.)

But that statute must be read in light of *Foulk*[4] and *Copeland*.[5] In *Foulk*, the Kansas Court of Appeals held that a worker could not avoid the presumption against work disability as contained in K.S.A. 1988 Supp. 44-510e (the predecessor to the above-quoted statute) by refusing to attempt to perform an accommodated job, which the employer had offered. And in *Copeland*, the Kansas Court of Appeals held, for purposes of the wage loss prong of K.S.A. 44-510e (Furse 1993), that a worker's post-injury wage should be based upon the ability to earn wages rather than the actual post-injury wage being earned when the worker failed to make a good faith effort to find appropriate employment after recovering from the work injury.

> If a finding is made that a good faith effort has not been made, the factfinder *[sic]* will have to determine an appropriate post-injury wage based on all the evidence before it, including expert testimony concerning the capacity to earn wages. . . .[6]

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[4] *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

[5] *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

[6] *Id.* at 320.

The Board concludes claimant failed to prove that she made a good faith effort to retain her accommodated job with respondent or that she made a good faith effort to find other appropriate work. Under these facts, the Board concludes that a post-injury wage should be imputed to claimant and that the imputed post-injury wage should be based upon the accommodated job of bagging finger meat that she performed for respondent.

Claimant has not established that she has sustained a wage loss greater than 10 percent due to her work-related back injury. Accordingly, the Judge was correct in limiting claimant's permanent partial general disability to the stipulated 10 percent whole body functional impairment rating.

The Board adopts the Judge's findings and conclusions that are not inconsistent with the above.

AWARD

WHEREFORE, the Board affirms the May 7, 2004 Award entered by Judge Fuller.

IT IS SO ORDERED.

Dated this ____ day of October 2004.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Stanley R. Ausemus, Attorney for Claimant
Kendall R. Cunningham, Attorney for Respondent and its Insurance Carrier
Pamela J. Fuller, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director